Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

PATRICIA CLARK,

Petitioner,

v.

WHIRLPOOL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether, construing evidence most favorably to Petitioner, in a case involving a claim by a Petitioner for disability discrimination under Ohio's statutory counterpart to the Americans With Disabilities Act, Respondent had sufficient notice of Petitioner's need for accommodation so as to trigger its responsibility to engage in an interactive process in order to arrive at an appropriate accommodation and whether Respondent's use of a 100% healed policy requirement for a return to work for non-occupational injuries was improper.

2. Whether Petitioner was a qualified person with a disability as a result of her long period of working over her injuries from the date of injuries sustained in a tow motor accident in March of 1996 until her last day of work on September 17, 1999 which ultimately led to her disability retirement.

PARTIES TO THE PROCEEDING

Patricia Clark, Petitioner and Plaintiff-Appellant below, is an individual resident of the City of Rawson, County of Hancock, State of Ohio and was formerly employed by Respondent.

Respondent, Defendant-Appellee below, Whirlpool Corporation, is a corporation duly incorporated under the laws of the State of Delaware with its principal headquarters and place of business in the State of Michigan. Respondent operates a manufacturing facility in Hancock County, Ohio where Petitioner was employed and where the incidents complained of herein took place.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on August 31, 2004. This decision was not recommended for full text publication by the Sixth Circuit and is unpublished. This decision is attached hereto as Appendix A. The Order of the Northern District of Ohio, Western Division (per Judge James G. Carr) granting Respondent's Motion for Summary Judgment in all respects was entered March 18, 2003 and is unpublished. See Appendix B. This Order was accompanied by a Judgment Entry also entered by the District Court on March 18, 2003. The Judgment Entry is also unpublished and is attached hereto as Appendix C.

STATEMENT OF JURISDICTION

The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to 28 U.S.C. Section 1332, known as the Court's Diversity of Citizenship jurisdiction. Petitioner brought claims of disability discrimination, inter alia, under Ohio Revised Code Section 4112.02(A) made actionable pursuant to Ohio Revised Code Section 4112.99 as amended. Petitioner invoked the jurisdiction of the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Statutes involved, Ohio Revised Code Sections 4112.01 (A)(13), 4112.02(A) and 4112.99 as amended are set forth in Appendix D.

STATEMENT OF THE CASE

Statement of Facts

Petitioner was employed at Respondent's facility in Findlay, Ohio from 1972 until May of 2000 when she went on disability retirement. Her tenure of employment was approximately twenty-eight years. In May of 2000, Appellant went on disability retirement occasioned by the worsening of her injuries over time. Ms. Clark worked in consoles, which involved taking unfinished consoles weighing off a press–one in front and one behind her–to inspect the console, trim it, and stack it on totes weighing about 315 pounds. One console comes out of each press per minute; thus, a console employee must handle two consoles per minute–one from the press before him/her and one from the press behind him/her. Once the tote is full of consoles, the tote (which by then weighs 480 pounds is then pushed out into the aisle to be picked up by a tow motor.

Petitioner was injured in March of 1996 when she was backed into and then dragged forward by a tow motor. As a result of the tow motor incident, Petitioner suffered injuries to her back, left knee, right arm, and right foot. In days following the tow motor incident, Ms. Clark was unable to move her left foot. Petitioner was out of work for about one month from March until April of 1996 due to her injuries. Petitioner returned to work on April 15, 1996 without

restriction, although she testified that she was "forced" back to work.

Petitioner asked for, and received, a conveyor upon returning to work in April of 1996, although in fact all console presses except those operated by Appellant had been equipped with conveyors. Thus, Petitioner's use of a conveyor was no different than any other console worker and in fact she had been the only console worker without a conveyor until the tow motor incident occurred. Prior to her return to work, Petitioner had been told that she would be returning to light duty, but that did not come to be.

Petitioner was placed on the following restriction by way of doctor's order for her return to work on April 26, 1996: maximum lifting, pushing and pulling weight of 20 lbs.; 4-8 bends per hour at 30 to 45 degrees; should take a break every 20-30 minutes. Petitioner testified that these restrictions were never honored by Respondent. Petitioner testified that she was pushing totes that weighed four hundred and some pounds and that she never had stretch breaks every twenty to thirty minutes. She stated that she was bending , twenty to forty-five degrees every time, twice. Petitioner testified that she never received the restrictions and they were never granted.

Petitioner received a myelogram and was out of work from May 30, 1996 until June 3, 1996. Petitioner took Family and Medical Leave in June of 1998 in order to care for her mother, and was further given a voluntary layoff in December of 1998 until January of 1999. Upon her return to work in January of 1999, Petitioner was given work in the Kitchen Aid department. Petitioner testified that she was able to perform one of the six Kitchen Aid jobs, which involved putting labels on boxes. Despite Petitioner's ability to perform the Kitchen Aid position, Respondent moved her to

the position of soil separator, which involves much more manual labor than the Kitchen Aid position. Thus, Petitioner's injuries again caused her much pain and discomfort at work. Petitioner testified that relative to the soil separator position, she could not work and that she bawled all the way out because she hurt so bad, she knew she couldn't do it.

From February of 1999 until August of 1999 Petitioner was on excused medical leave per her doctor's orders. Petitioner was cleared to return to work without restrictions. However, Petitioner testified that the reason for her having no restrictions was that Respondent had a company policy of not allowing injured employees to return to work unless they return without restrictions. Petitioner testified that you have to be able to come in and do your job full capacity or you don't go back to work. She testified that she told Dr. Lin, her treating physician, to put her back to work. Petitioner also testified that its generally known that you don't go back to work with any restrictions if its not a workers compensation case. She noted that you don't get back in the plant with restrictions if you have not been hurt on the job. Petitioner worked shortly after her return to work in August of 1999 but was again forced to take sick leave in September of 1999 until April of 2000. Although she applied for disability retirement in February of 2000, Appellant's retirement did not take effect until May of 2000 and she received her first disability retirement check in July of 2000.

From 1996 until Petitioner's disability retirement, Respondent never included Petitioner's injured back, neck and hips in her workers compensation claim. Respondent argues that Petitioner is seeking a time-barred resurrection of her workers compensation claim but Petitioner contends that the above indicates a lack of accommodation on the part of Respondent in that part of Petitioner's injuries were never

considered by Respondent upon Petitioner's return to work. Petitioner testified that if Respondent had acknowledged that she had hurt her neck and her back, she would have been able to have medical treatment sooner and she would not have been in the condition that she was.

Description of Proceedings Below

The District Court disposed of this case on the employer's Motion for Summary Judgment. The District Court found that Petitioner was not handicapped (disabled) within the meaning of Ohio Revised Code Section 4112.01 (A)(13). The District Court reasoned that Petitioner had not presented objective medical evidence to support her claim of disability and had presented only self-serving and conclusory testimony of her disability. The District Court next held that Petitioner had failed to offer proof that she had requested reassignment to other jobs or that there were available jobs for which she was qualified, noting that it viewed that Petitioner had the initial burden of proposing an accommodation and of showing that the accommodation was reasonable and that she was qualified to perform the position with the proposed accommodation. The District Court then noted that Petitioner was not qualified to work in positions with accommodation seemingly because of the leaves that she took from mid-March of 1996 until she obtained disability retirement in early 2000. The District Court did not focus on the fact that Petitioner did in fact work substantial periods of time despite significant pain during this period and her contention that the Respondent forced her out on disability retirement as she could not return to work unrestricted. The District Court also dismissed Petitioner's claims of disability harassment and retaliation, which claims Petitioner did not appeal to the Sixth Circuit and which are not presented before this Court.

Ms. Clark appealed to the United States Court of Appeals for the Sixth Circuit. There, she presented two basic arguments. Firstly, Petitioner contended that the District Court erred in concluding that she had failed to meet her burden of showing that she was disabled within the meaning of Ohio Revised Code Section 4112.02(A)(13). Secondly, Petitioner contended that the District Court erred in concluding that she did not suffer an adverse employment action and was unable to perform the essential functions of her job, and that, in so concluding, the District Court overlooked her contention that Respondent failed to accommodate her and failed to engage in an interactive process. In an Opinion filed on August 31, 2004 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court (Appendix B).

The Sixth Circuit panel disagreed with the District Court on the issue of whether Petitioner had come forward with sufficient evidence to create a question of fact on the first element of her disability discrimination claim under Ohio law. The Sixth Circuit reasoned that with due consideration to the indulgent standard that it must apply to the evidence at the summary judgment stage of the proceedings, Petitioner had demonstrated that her injury-induced pain limited her ability to walk and work, both major life activities under Ohio law, to a degree that is significantly less than the average person in the general population. The Sixth Circuit concluded that reasonable minds could differ on the question of whether the Petitioner suffered from a disability. The Sixth Circuit, however, agreed with the District Court that Petitioner had failed to establish that she neither suffered an adverse employment decision, nor that she was able to perform essential job functions. The Sixth Circuit, accordingly, affirmed the decision of the District Court.

This case presents several questions. The first question involves the issue of whether, construing evidence most favorably to Petitioner, in a case involving her claim of disability discrimination under Ohio's statutory counterpart to the Americans With Disabilities Act, Respondent had sufficient notice of Petitioner's need for accommodation such as to trigger its responsibility to engage in an interactive process in order to arrive at an appropriate accommodation and whether Respondent's use of a 100% healed policy requirement for a return to work for non-occupational injuries was improper. The record shows that the Respondent did have alternative transitional work available for occupational injuries, but that employees involved in non occupational injuries did not have the benefit of this program. The second issue is whether Petitioner was a qualified person with a disability as a result of her long period of working over her injuries from the date of injuries sustained in a tow motor accident in March of 1996 until her last day of work on September 17, 1999 which ultimately led to her disability retirement. In this case, Petitioner's injuries and pain worsened significantly over time, yet the Court's below seem to have focused only on her status at the end of her ordeal when she went on permanent disability, rather than focusing on her plight from mid March of 1996 until September of 1999, when her actual ordeal took place.

ARGUMENT

Petitioner, as noted, *supra*, contends that the requirements for granting a motion for summary judgment have not been met with respect to Petitioner's disability discrimination claim. The Sixth Circuit held that Petitioner presented a material issue of fact as to whether she was disabled with the meaning of Ohio's disability statute. However, the Sixth Circuit held that Petitioner did not show that she requested an

accommodation. Further, the Sixth Circuit held that Petitioner was not able to perform the essential functions of her job. Petitioner contends that the Sixth Circuit failed to consider that it was futile for her to request accommodations as a result of the Respondent's 100% healed return to work policy and decided this case contrary to its own past precedent and that of the Tenth Circuit. Its ruling would allow an employer to set up a discriminatory policy and then use it as a shield to insulate it from having to consider accommodations under disability discrimination law.

Petitioner contends that disability discrimination can include both an employer's taking an adverse employment action based on an employee's disability and an employer's failure to make a reasonable accommodation. Under Ohio disability law, an employer must make reasonable accommodation to the disability of an employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of an employer's business. See *Shaver v. Wolske & Blue, et al.* (2000), 138 Ohio App.3d 653, 663; *Monnette v. Electronic Data Systems Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996).

With regard to the accommodation issue, in general it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed. 29 C.F.R. Section 1630.9, App. (1995). Once such a request is made, the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability. 29 C.F.R. Section 1630.9. An employee's request for an accommodation triggers an employer's obligation to participate in the interactive process. *Taylor v. Phoenixville School District*, 184 F.3d 296, 306 (3d Cir.

1999). See generally *Gile v. United Airlines, Inc.*, 213 F.3d 365 (7th Cir. 2000); *Cravens v. Blue Cross and Blue Shield of Kansas City*, 214 F.3d 1011 (8th Cir. 2000).

In the case at bar, Petitioner testified that she was forced back to work and cited an unwritten policy of Respondent to require injured workers, at least those like her who were categorized largely as non occupational, to return to work without restrictions. For that reason, Petitioner testified that she was forced to ask her doctor to return to work without restrictions for fear of losing her job, even though Appellant testified that she did not agree with such a diagnosis. Upon Petitioner's return to work from voluntary layoff in January of 1999, Ms. Clark testified that she was able to perform one of the six jobs on the Kitchen Aid line, placing labels on boxes. Despite this, Respondent unilaterally moved Petitioner to the job of soil separator, a much more physical and demanding position. Furthermore, Respondent testified that she was not able to request a slow down of the presses which produced two consoles per minute for her to prepare and place on the tote. Thus, Respondent prevented Petitioner from such a light duty position which she could have worked and per its 100 per cent healed policy kept Petitioner from light duty work throughout the post tow motor incident period of employment.

Petitioner underwent an additional surgery in October of 1999. Dr. Lin, in referring to his progress notes, marked as Exhibit A to his deposition, noted that on August 13, 1999, Respondent forced Petitioner to return to work. Dr. Lin testified that when Petitioner had informed him that Respondent wanted her back to work he did not know at the time what her job was and did not know what her job duties were. Dr. Lin further noted that the Petitioner's description of her pain levels drove the decision as to whether or not she

was disabled. Dr. Lin did testify graphically that after a subsequent review of Petitioner's March 18 1996 x-ray taken a few days after the tow motor accident he determined that Petitioner's previously installed metal cervical plate was fractured at the time. In the within case, the Respondent has conveniently attempted to insulate itself from any type of interactive process and, hence, accommodation, by contesting that many of Petitioner's injuries were work related and by applying a 100 per cent healed return policy to those who suffer injuries other than on the job. It is respectfully submitted that the Sixth Circuit, in noting that there is no suggestion in the record that the Petitioner's request for accommodation would have been duly considered–especially in light of the evidence that the only accommodation request that the Petitioner made was allowed, overlooked the fact that in this case, the Respondent had knowledge of the nature of Petitioner's injuries and of the manner in which they affected her ability to perform her job. Petitioner's injuries were of long term duration as she continued on in active employment for over three years after the tow motor accident. See *Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560 (7th Cir. 1996). The holding of the Sixth Circuit overlooks that fact that a request for an accommodation, in light of the employer's 100% healed policy in the within case, would have been a futile gesture. Accordingly, based on the facts of this case, the Sixth Circuit's decision was contrary to its earlier decision in *MX Group, Inc. v. City of Covington,* 293 F.3d 326 (6th Cir. 2002), which held that the law requires no one to perform a useless act. The Sixth Circuit in *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998), rejected an argument that a disabled plaintiff who was allegedly denied a reasonable accommodation could not sue for damages on the basis that plaintiff chose to violate medical restrictions by working against them. In *Davoll v. Webb*, 194 F.3d 1116 (10th Cir. 1999), the Tenth Circuit agreed that an individual

normally must initiate the interactive process–including requesting reassignment if no accommodation exists in the current job. However, the *Davoll* court discussed an exception to this rule, which it labeled the "futile gesture doctrine." Specifically, if the individual knows that the requst would be futile, he/she might not need to initiate the interactive process. For example, the court noted that if the individual knows of an employer's discriminatory policy against reasonable accommodation, he/she need not ignore the policy and subject himself to personal rebuff by making a request that will surely be denied.

The Courts below further concluded that Petitioner was unable to safely and substantially perform the essential functions of the job in question. The record evidence shows that even though Appellant was in great pain she continued on in working on an unrestricted basis for much of the period of time after her March 14, 1996 tow motor incident and until she went on disability retirement in February of 2000. Petitioner returned to work on about one month after the accident in mid April of 1996 when she was told that she would be returned to work on a light duty basis. Petitioner went on Family and Medical Leave and a voluntary layoff to alleviate the pain and keep from getting terminated. Her last day of work was September 17, 1999, shortly after being returned to work by Dr. Lin, when she bawled all the way because of the hurt. The Courts below chose to focus on the time frame after Appellant's disability retirement and seized on deposition testimony as to Petitioner's inability to work at the time of her deposition, but ignored the time frame between the tow motor incident and September 17, 1999 when Petitioner made a gallant effort to work over great pain and did so for significant periods of time. It is submitted that on the facts of this case, summary judgment is inappropriate.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Clark respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix A.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 03-3582

[Filed August 31, 2004]

PATRICIA CLARK, Plaintiff-Appellant,	)
v.	)
WHIRLPOOL CORPORATION, Defendant-Appellee	)

BEFORE: SUHRHEINRICH and GIBBONS, Circuit Judges, and LAWSON, District Judge.[1]

[1] The Honorable David M. Lawson, United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINION

DAVID M. LAWSON, District Judge.

The plaintiff filed an action in the district court alleging that the defendant harassed, retaliated and discriminated against her on account of a disability in violation of Ohio law. Jurisdiction was based on diversity of citizenship. *See* 28 U.S.C. § 1332. Under Ohio Revised Code Section 4112.01 *et seq.*, the plaintiff was obliged to plead and prove that she was handicapped, her employer took an adverse action against her because she was handicapped, and she could otherwise safely perform the essential functions of her job. *See Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St. 3d 279, 25 Ohio B. 331, 496 N.E.2d 478, 480 (Ohio 1986). The district court granted summary judgment to the defendant because it found that the plaintiff failed to establish a material fact question on all three elements of her discrimination claim. The district court also concluded that the record contained no evidence of harassment or retaliation based on disability or the plaintiff's pursuit of workers' compensation benefits. The plaintiff appealed and we affirm.

I

The plaintiff was employed as a production worker at Whirlpool's Findlay, Ohio plant from 1972 until May 2000, when she voluntarily elected to retire on account of disability. In March 1996, she suffered a work-related injury to her back, left knee, right arm, and right foot that caused her to miss work for a month. At the time of her injury, Ms. Clark's duties required her to remove plastic consoles from a press, inspect and trim them, stack them on a tote, and then push the full tote into an aisle to be picked up by a tow motor.

The plaintiff returned to work on April 15, 1996 after her doctor released her without restrictions. She resumed her same job. She also applied for and received workers' compensation benefits for the period of her injury. Ms. Clark says that despite her physician's unrestricted release to return to work, she was not fully recovered; rather she asked her doctor to impose no restrictions because she believed that Whirlpool had a policy of not allowing injured employees back into certain production jobs if they had any work restrictions. The plaintiff acknowledges that no written policy to that effect exists, and the record contains no other testimony that confirms the plaintiff's belief. In addition, a doctor employed by the defendant examined the plaintiff and placed temporary lifting, pulling and pushing, bending, and standing restrictions through May 10, 1996. When Ms. Clark returned to work, she asked for a conveyor to assist in her job functions, and the defendant accommodated that request.

Except for a four-day period in May-June of that year, the plaintiff worked continuously in her production job until April 1998 when she took family leave to care for her mother. She returned to her prior job without restrictions in June 1998, where she remained until December 7, 1998. On that date,

she agreed to a voluntary layoff that lasted until January 25, 1999. When she was called back to work she was placed in the Kitchen Aid department, where, she testified, she could perform only one of the jobs. Ms. Clark was then transferred to the position of soil separator, which required more manual labor than the Kitchen Aid position. Ms. Clark did not request an accommodation at that time but worked without restrictions until February 22, 1999 when she submitted a request for medical leave, which was granted. She left work again from February 22 through April 15, 1999 on a medical leave, and that leave was extended twice ultimately through July 16, 1999. She then submitted another request for leave that was granted through August 1999. During her absence from work. Ms. Clark received payments under the defendant's sickness and accident policy, which provided coverage for six continuous months of absence.

The plaintiff returned to work on August 23, 1999 without restrictions. The defendant's sickness and accident policy began anew after the employee had worked for two weeks following six months of continuous absence. On September 27, 1999, Ms. Clark submitted a request for medical leave through January 3, 2000. That request was granted and extended several times until May 2000. The plaintiff applied for disability retirement in April 2000, received it the next month, and has not worked for the defendant since then.

Following her 1996 accident, Ms. Clark underwent several diagnostic studies of her neck and back. An X-ray of the cervical spine taken shortly after the accident revealed "good fusion of the cervical spine with good alignment and plate fixation." J.A. 192. The X-ray also showed a break in the Synthes plate at the mid portion. J.A. 196. A myelogram performed on May 30, 1996 showed a "mild diffuse bulging

disc of L4-L5, which has been unchanged in the past one year." J.A. 194.

Ms. Clark was examined by her neurosurgeon on December 2, 1997 and presented with complaints of severe pain in the toes, hip, back, neck and shoulder. She was seen again on December 29, 1998 for complaints of severe neck and lower back pain. A CT scan and myelograms obtained around that time showed "good bone fusion and plate fixation and good alignment at the level of C6-C7, although the plate appeared to be fractured in the middle. . . . There is also a spur and bulging disc at C5-C6, which is somewhat bigger than it used to be." J.A. 199. The reports also noted a bulging disc at L4-L5, which was unchanged, and a "vacuum phenomenon of L4-L5 with narrowing of the disc space." *Ibid.*

Subsequently a Discogram and CT scan in June or July of 1999 showed a "prominent indentation of the dural sac at C6 and evidence of annular tear of the disc in the left paracentral portion of C5-6." J.A. 227. On October 18, 1999, Ms. Clark underwent an operation for excision of a ruptured disc and spur of C5-6 and interbody fusion and titanium plate fixation. A MRI taken on June 22, 2000 revealed degenerative disc disease at multi-levels but most notably at L4-L5 and L5-S1. Clark received an epidural block of L3-L4 on August 22, 2000. Myelograms of the cervical and lumbar spines performed on February 23, 2001 revealed mild diffuse annular bulging at C4-5, L4-5 and L5-S1 but did not reveal any disc herniations.

Nearly two years after the plaintiff left Whirlpool's employ on disability retirement, she filed an action in the district court alleging disability discrimination, harassment and retaliation pursuant to Ohio Revised Code Sections

4112.02(A) and 4112.02(I). The plaintiff contended that Whirlpool failed to accommodate her need for a lighter duty job and instead assigned her to the soil separator job, which she could not perform. She also argued that the company's 100 percent healed policy forced her back to work before she was fully recovered, and that the company did not offer her reasonable accommodations to allow her to cope with her conditions. Following discovery, Whirlpool moved for summary judgment. The district court granted Whirlpool's motion on March 18, 2003 and dismissed the case. This appeal timely followed.

II

On appeal, this court reviews a grant of summary judgment *de novo* using the same standard as the district court. *Henderson v. Ardco, Inc.*, 247 F.3d 645, 649 (6th Cir. 2001). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We must accept the plaintiff's evidence and draw all justifiable inferences in her favor. *Brenneman v. MedCentral Health Sys.*, 366 F.3d 412, 417 (6th Cir. 2004) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)). However, summary judgment is appropriate if the plaintiff fails to make a showing sufficient to establish the existence of an element that is essential to her case. *Howard v. City of Beavercreek*, 276 F.3d 802, 805 (6th Cir. 2002) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548(1986), 91 L. Ed. 2d 265).

Section 4112.02(A) of the Ohio Revised Code prohibits employers from "discharging without just cause, . . . refusing to hire, or . . . otherwise discriminating against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment . . . because of [a] handicap." As noted above, under that statue the plaintiff is required to establish three elements to advance a disability discrimination claim: "(1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *Columbus Civil Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 1998 Ohio 410, 697 N.E.2d 204, 206 (Ohio 1998) (citing *Hazlett*, 496 N.E.2d at 480).

The plaintiff contends that the district erred in finding that she had not offered sufficient evidence that she was handicapped. A handicap is defined by the Ohio statute as

> a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

Ohio Rev. Code. § 4112.01(A)(13). The district court appropriately turned for guidance to federal law construing the Americans with Disabilities Act (ADA) in interpreting this statute. *See City of Columbus*, 697 N.E.2d at 206-07 (citing *Little Forest Med. Ctr. v. Ohio Civil Rights Comm'n*, 61 Ohio St. 3d 607, 575 N.E.2d 1164 (Ohio 1991)). Federal regulations refer to a hypothetical "average person in the

general population" as a benchmark for evaluating substantial limitations on life activities. *See* 29 C.F.R. § 1630.2(j)(1) (stating that a person is substantially limited if she is "unable to perform a major life activity that the average person in the general population can perform, or is significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity"). Factors to consider in making this assessment include "(i) the nature and severity of the impairment; (ii) the duration or expected duration of the impairment; and (iii) the permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment." *Id.* § 1630.2(j)(2).

The plaintiff testified that throughout the day she was in constant pain due to the injuries to her neck, back, hips, feet and left knee; she had headaches that required her to take sixteen Ibuprofen each day; she took narcotic pain medication to control her discomfort; she could not control her bowels or bladder; and she had to take medication to help her sleep. J.A. at 93. However, the district court dismissed this evidence as self-serving and uncorroborated by any objective medical findings. The lower court also pointed to the conflicting medical testimony from Dr. Cheng-Te Lin, the plaintiff's treating neurologist, who stated that he could not find a medical reason the plaintiff could not work. However, the plaintiff's subjective complaints of disabling pain may be sufficient to prove that she was "handicapped," as that term is defined in the statute; there is no requirement that the plaintiff bolster that testimony with corroborating medical evidence. Moreover, Dr. Lin testified that "usually pain is subjective matters. In the way you do the physical therapy and physical examination cannot describe the amount of the pain

that the patient is suffering, so you have to go along with the patient's complaints." *Id.* at 171. In addition, Dr. Lin said that the plaintiff's ability to bend could be impaired due to the surgeries she had on her spine, and that depending on the amount of her pain, Ms. Clark would be restricted in her ability to walk distances, sit or stand for a long period of time, and bend or stoop. *Id.* at 179, 183.

We believe that the plaintiff came forward with sufficient evidence to create a question of fact on the first element of her disability discrimination claim under Ohio law, especially under the indulgent standard we must apply to the evidence at the summary judgment stage of the proceedings. She demonstrated that her injury-induced pain limited her ability to walk and work, both "major life activities" under Ohio law, to a degree that is significantly less than the average person in the general population. Reasonable minds could differ on the question of whether the plaintiff suffered from a handicap.

However, we agree with the district court that the plaintiff failed to establish the second and third elements of her claim because she neither suffered an adverse employment decision, nor, by her own admission, was she able to perform essential job functions.

This court evaluates adverse employment action in the context of the ADA according to the factors we adopted from the Seventh Circuit's decision in *Crady v. Liberty National Bank and Trust Co.*, 993 F.2d 132 (7th Cir. 1993). *See Kocsis v. Multi-Care Mgmt.*, 97 F.3d 876, 886 (6th Cir. 1996). In *Crady*, the court stated:

> a materially adverse change in the terms and conditions of employment must be more disruptive

> than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

993 F.2d at 136. Likewise, the Ohio state court has found that an "adverse action need not result in pecuniary loss, but must materially affect the plaintiff's terms and conditions of employment. . . . Changes in employment conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action." *Peterson v. Buckeye Steel Casings*, 133 Ohio App. 3d 715, 729 N.E.2d 813, 822 (Ohio Ct. App. 1999) (citations omitted).

The failure of an employer to reasonably accommodate an employee's known disability can constitute adverse employment action under both federal and Ohio law. See 42 U.S.C. § 12112(b)(5)(A); Ohio Admin. Code § 4112-5-08(E)(1). In this case, the plaintiff contends that Whirlpool failed to provide reasonable accommodations to the plaintiff by "forcing" her to return to work under the unwritten "100 percent healed" policy, and assigning her as a soil separator when that job exceeded her physical capabilities. The district court deemed critical the undisputed fact that the plaintiff did not ask for any accommodation beyond furnishing a conveyor, which was granted. No other adjustment in work function or duties was requested.

In *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1046-47 (6th Cir. 1998), this court observed that "there is no

question that the EEOC has placed the initial burden of requesting an accommodation on the employee. The employer is not required to speculate as to the extent of the employee's disability or the employee's need or desire for an accommodation." (footnote omitted). Of course, when a request would be futile, we have excused the failure to make it when the need for an accommodation was obvious to the employer. *See MX Group, Inc. v. City of Covington*, 293 F.3d 326, 344 (6th Cir. 2002) (stating that under the ADA, "we agree with the district court, that the law requires no one to perform a useless act") (internal quotes and citations omitted). However, there is no suggestion in the record that the plaintiff's request would not have been duly considered, especially in light of the evidence that the only accommodation request the plaintiff actually made was allowed.

The plaintiff insists that Whirlpool was obliged to engage in an interactive process to reach a mutually acceptable accommodation for the plaintiff's disability. She cites *Taylor v. Phoenixville School District*, 184 F.3d 296 (3rd Cir. 1999), in support of that proposition. However, that case states that the employer's obligation to participate in a-dialogue about accommodations is triggered by the employee's request. *See id.* at 319-20 (stating that "to show that an employer failed to participate in the interactive process, a disabled employee must demonstrate: 1) the employer knew about the employee's disability; 2) *the employee requested accommodations or assistance* for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith") (emphasis added). As noted earlier, the plaintiff did not make any such request.

Nor did the plaintiff offer evidence that she was qualified to perform the essential functions of her job. To the contrary, she testified that she could do no work. Under the Ohio anti-discrimination statute, the employee must show that she is able to "safely and substantially perform the essential functions of the job in question." *Fitzmaurice v. Great Lakes Computer Corp.*, 155 Ohio App. 3d 724, 2004 Ohio 235, 803 N.E.2d 854, 856 (Ohio App. 2004). To meet this requirement, the plaintiff may show that she can perform the job in question with or without a reasonable accommodation. *Shaver v. Wolske & Blue*, 138 Ohio App. 3d 653, 742 N.E.2d 164, 170 (Ohio App. 2000). However, the district court quoted her deposition testimony in which she stated unequivocally that she was unable to work and that there were no jobs that she felt she could perform. *See* J.A. at 103. She further testified that she took medical leaves and a voluntary layoff because she was unable to work. *See* J.A. 59, 73, 77 and 89. She requested and received disability retirement. The district court correctly held that the plaintiff did not identify any position that she can work with or without restriction.

III

The plaintiff has not included her claims of harassment or retaliation among her issues on appeal. She has not presented any arguments as to the district court's dismissal of those claims in either her opening brief or her reply brief. "We normally decline to consider issues not raised in the appellant's opening brief." *Bickel v. Korean Air Lines Co.*, Ltd., 96 F.3d 151, 153 (6th Cir. 1996) (quoting *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)); see Fed. R. App. P. 28(a). Claims not raised in the briefs are considered to be waived. See Bickel, 96 F.3d at 153 (declining to consider issue not raised in the opening brief). Therefore, we will not address those issues.

IV

Although we disagree with the district court's ruling on whether the plaintiff raised a triable issue concerning whether she was handicapped, we find no error in that court's conclusion that the plaintiff's evidence was insufficient on the second and third elements of her discrimination claim. Summary judgment for the defendant is required when the plaintiff fails to establish all of the essential elements of her cause of action. *Howard*, 276 F.3d at 805. Accordingly, we **AFFIRM** the judgment of the district court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:02CV7141

ORDER

Patricia Clark, Plaintiff
v.
Whirlpool Corporation, Defendant

Plaintiff Patricia Clark brings this action against defendant Whirlpool Corporation ("Whirlpool") claiming disability discrimination, harassment, and retaliation in violation of Ohio Revised Code § 4112.01 *et seq.* This court has jurisdiction pursuant to 28 U.S.C. § 1332. Pending is defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. For the following reasons, defendant's motion shall be granted.

BACKGROUND

Plaintiff began working at defendant's Findlay, Ohio, plant in 1972. Her last job involved running consoles in the plastics department. Plaintiff would take unfinished consoles off of a press to inspect, trim, and decorate them. She would then stack the consoles onto a tote. Once the tote was full of consoles, plaintiff would push the tote into an aisle to be picked up by a tow motor.

On March 14, 1996, plaintiff was hit by the tow motor. As a result of the accident, plaintiff claims she suffered injuries to her back, left knee, right arm, and right foot. Also, the accident "significantly aggravated preexisting neck injuries and back and hip injuries resulting from a previous occupational injury." Pl.'s Complt. at ¶ 6.

After the accident, plaintiff applied for and received workers compensation benefits but only for a broken toe, right foot sprain, left knee contusion/sprain, and left foot sprain.[1] Plaintiff was on medical leave for one month.

On April 15, 1996, plaintiff returned to work. Even though plaintiff's doctor returned her to work without restrictions, plaintiff claims that when she returned to work, she suffered from "the disabling conditions of injured foot, and neck, back and hip conditions." *Id.* at ¶ 7. When she returned, the only accommodation plaintiff requested was use of a conveyor, which Whirlpool provided.

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[1] Whirlpool is a self-insured employer which uses a third-party administrator for purposes of reviewing and making decisions regarding its employees' workers compensation and disability claims.

On April 26, 1996, a Whirlpool doctor examined plaintiff, and, as a result, placed restrictions on plaintiff's ability to work for three weeks. Plaintiff was allowed to work eight hour days, but any lifting, pushing, and pulling was restricted to twenty pounds and bending was restricted to four to eight times per hour. The Whirlpool doctor also recommended a sitting job only and frequent stretch breaks. Plaintiff, however, does not recall seeing Whirlpool's doctor or having these restrictions placed on her. Apparently, the restrictions were not followed.

From April, 1998, to June, 1998, plaintiff took leave to care for her mother. From December, 1998, to January 25, 1999, plaintiff took voluntary layoff. On both occasions, plaintiff returned to work without restrictions and without asking for accommodations.

Between February and August, 1999, plaintiff was on extended medical leave. Plaintiff's doctor diagnosed her with "cervical, thoracic and lumbar sprain/strain" and a herniated disc. Def.'s Ex. G, H; W000191, W000842, W000849, W001710. During this period, defendant provided payments to plaintiff pursuant to its sickness and accident policy. Under this policy, however, benefits were exhausted after six continuous months.

On August 23, 1999, plaintiff returned to work, resuming her prior position running consoles. Plaintiff's doctor did not place any restrictions on her, and she did not ask for an accommodation.

On September 27, 1999, plaintiff again went on extended medical leave. She received benefits under Whirlpool's sickness and accident policy until March, 2000.

In October, 1999, plaintiff underwent herniated disc surgery for the second time.[2] Plaintiff's doctor replaced a broken plate.

On February 21, 2000, plaintiff applied for disability retirement. Her application for retirement was approved on May 1, 2000.

In March, 2002, plaintiff filed this suit claiming defendant intentionally discriminated against her an harassed her on the basis of her disability. Plaintiff also alleged defendant retaliated against her after she reported her disability and insisted on treatment and proper accommodation.

STANDARD OF REVIEW

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (quoting FED. R. CIV. P. 56(e)).

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[2] Plaintiff first had a discectomy in March, 1995. Plaintiff's doctor testified that the first surgery was a success because plaintiff had good fusion and no spinal compromise.

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleadings or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. *Celotex*, 477 U.S. at 324.

In deciding the motion for summary judgment, the evidence of the non-moving party will be accepted as true, all doubts will be resolved against the moving party, all evidence will be construed in the light most favorable to the non-moving party, and all reasonable inferences will be drawn in the non-moving party's favor. *Eastman Kodak Co. v. Technical Servs.*, Inc., 504 U.S. 451, 456 (1992). Summary judgment shall be rendered only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

DISCUSSION

I. Disability Discrimination

Under Ohio law, it is unlawful "for an employer, because of the ... handicap,... of any person, to discharge without just cause, to refuse to hire, or to otherwise discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment." O.R.C. § 4112. 02(A). To establish a prima facie case of handicap discrimination, the person seeking relief must demonstrate

"(1) that he or she was handicapped, (2) that an adverse employment action was taken by an employer, at least in part, because the individual was handicapped, and (3) that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *City of Columbus Civ. Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 571 (1998) (citing *Hazlett v. Martin Chevrolet, Inc.*, 25 Ohio St. 3d 279, 281 (1986)).

A. Whether Plaintiff is Handicapped

Under Ohio Revised Code § 4112.01 (A)(13), "disability" means:

> a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self; performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

Chapter 4112 does not define "substantially limits." The Supreme Court of Ohio, however, has urged courts to look to the American with Disabilities Act, 42 U.S.C. § 12112, for guidance interpreting Ohio's prohibition on disability discrimination. *City of Columbus Civil Serv. Comm'n v. McGlone*, 82 Ohio St. 3d 569, 573 (1998) ("The Americans with Disabilities Act ('ADA') is similar to the Ohio handicap discrimination law.... We can look to regulations and cases interpreting the federal Act for guidance in our interpretation of Ohio law.").

Under the Code of Federal of Regulations, "substantially limits a major life activity" means a person is "[u]nable to

perform a particular major life activity that the average person in the general population can perform," or the person is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.20)(1)(i), (ii).

The following factors are considered in determining whether an individual is substantially limited in a major life activity:

(i) the nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.(j)(2)(i)-(iii).

In the Sixth Circuit, a physical condition or limitation is not considered a substantial impairment or handicap "unless it places an individual so far outside the norm as to make it impossible or unusually difficult for that individual to perform work that could be done by most other people." *Szalay v. Yellow Freight Sys. Inc.*, 998 F. Supp. 799, 802 (N.D. Ohio 1996, internal citations omitted). *In Penny v. United Parcel Serv.*, 128 F.3d 408 (6th Cir. 1997), the court found a plaintiffwas not disabled within the meaning of the ADA despite the fact he suffered from a permanent partial impairment, would have long-term difficulty running and walking, and could not lift consistently more than twenty-five pounds. *Id.* at 416.

Plaintiff claims she is disabled due to the condition of her back, neck, hips, both feet, and left knee. Plaintiff also claims she suffers from degenerative arthritis. According to plaintiff's complaint, these conditions significantly affect her major life actvifies of "working, lifting, walking, breathing, caring for herself, sleeping, sitting, bending driving, thinking and concentrating, interacting with others and performing manual tasks." Pl.'s Complt. at ¶ 7.

Besides plaintiff's deposition testimony, the only evidence offered to support plaintiff's claim of disability is from her treating neurosurgeon, Dr. C.T. Lin. Dr. Lin testified that plaintiff suffers from pain due to disc problems in her neck.

Dr. Lin, however, testified that he extended plaintiff's medical leave only because of plaintiff's assessment of her pain -- not objective medical evidence.

Q: So she represented to you that the company was wanting her to go back to work?
A: Right

Q: And it was your assessment that she could try to do that?
A: Yeah. Why not?

Q: So when you're putting her out on disability for those spans of time it's more based on her beliefs of whether or not she can work at her current job?
A: Yes, of course.

Q: Did you know what her job was at Whirlpool during the time you were treating her?
A: No, I don't know.

Q: So you didn't know what sorts of activities her position required?
A: That's correct.

Lin Depo. at 48.

Besides plaintiff's report of pain, Dr. Lin could find no medical reason why plaintiff could not work. Id. at 50. He additionally could not say whether plaintiff's conditions substantially limited any major life activity. Id. at 53. In fact, he testified that plaintiff could work in some capacity:

> Depending on the amount of the pain she has, like sedentary work, like clerk, receptionist, those kinds of things, she could do that, but depending on the amount of pain she had in the neck or leg or back, she may not stand or sit down for many, many hours, for that kind of period.

Id. at 55.

Nevertheless, plaintiff argues that because of the pain in her neck and back she is substantially limited in the major life activities of bending, sitting for long periods of time, and sleeping. Plaintiff stated:

> I have constant pain all the time, every day of my life, headaches so bad that I take at least 16 Ibuprofen a day. I'm on Vicodin for pain, I'm on Detrol because I cannot control my bladder and my bowel and I am on Ambien because I cannot sleep at night because my body hurts so bad.

Pl.'s Depo. at 93.

Other than plaintiff's self-serving and conclusory testimony of her disability,[3] there is no objective medical evidence to support her claim of disability. Thus, plaintiff's evidence is not sufficient to meet her prima facie burden showing that she is disabled.[4]

B. Adverse Employment Action/Reasonable Accommodation

An adverse employment action is a "materially adverse change in the terms and conditions of ... employment." *Hollings v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999). As the court explained in *Peterson v. Buckeye Steel Castings*, 133 Ohio App. 3d 715, 727 (1999):

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[3] Several courts have declared that "self-serving affidavits without factual support in the record will not defeat a motion for summary judgment." *Albiero v. City of Kankakee*, 246 F.3d 927, 933 (7th Cir. 2001) (citation omitted); *see also Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990); *Syvongxay v. Henderson*, 147 F. Supp. 2d 854, 859 (N.D. Ohio 2001); *Wolfe v. Village of Brice*, 37 F. Supp. 2d 1021,1026 (S.D. Ohio 1999) ("Self-serving affidavits, alone, are not enough to create an issue of fact sufficient to survive summary judgment.") (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Copeland v. Machulis*, 57 F.3d 476, 479 (6th Cir. 1995)).

[4] Plaintiff additionally argues that she was "regarded as" disabled because defendant was aware of her medical problems going back to 1977. Regardless of whether plaintiff has created an issue of material fact that she meets the statutory definition of"disabled," however, she fails to meet the other two elements of her prima facie case. Therefore, I need not address this argument.

> The adverse action need not result in pecuniary loss, but must materially affect the plaintiffs terms and conditions of employment .... Factors to consider when determining whether an employment action was materially adverse include 'termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'... Changes in employment conditions that result merely in inconvenience or an alteration of job responsibilities are not disruptive enough to constitute an adverse employment action.

(citations omitted).

Plaintiff claims she suffered an adverse employment action when she was "forced" to go on medical leave and disability retirement by Whirlpool's failure to accommodate her disability.[5] Plaintiff further alleges that she was "forced" back to work without restrictions because of defendant's unwritten policy that injured workers will lose their jobs if they attempt to return to work with restrictions. According to plaintiff, because of this unwritten policy, she asked Dr. Lin

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[5] In her complaint, plaintiff argued that defendant "refused to recognize and treat any conditions other than Plaintiff's foot despite her complaints and harassed her by contesting her workers compensation filings despite its knowledge of the true extent of her problems." Pl.'s Complt. at ¶ 8. Plaintiff has not responded to defendant's argument in its motion for summary judgment that the denial of workers compensation benefits is insufficient to constitute an adverse employment action. Thus, plaintiff is deemed to have abandoned this claim.

to return her to work without restrictions even though she was still in pain. Plaintiff also appears to argue that this unwritten policy prevented her from asking for other reasonable accommodations, such as slowing down the presses on the console line, a "light duty" position, or for a position on the KithchenAid line that she could perform without pain.[6]

Plaintiff is correct that defendant has a duty to reasonably accommodate plaintiffs disability. O.A.C. § 4112-5-08(E)(1) ("An employer must make reasonable accommodation to the disability of an employee or applicant, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business."); 42 U.S.C. § 12112(a)(5)(A) ("The term 'discriminate' includes ... not making reasonable

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[6] Plaintiff also states:

> The fact that Defendant never gave Plaintiff an evaluation, waited 10 months before allowing Plaintiff the "walk through," and thereafter placed an inappropriate burden upon the Plaintiff to identify jobs she is "capable of performing" without allowing her an opportunity to see if she can perform such jobs, does not excuse the Defendant from its obligation to participate in the interactive process in providing a reasonable accommodation for Plaintiff's disability. See *Taylor* at 165.

Pl.'s Br. at 13-14.

In making this argument, plaintiff has not cited to the record or identified the source this information.

accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability....").[7]

When a plaintiff employee claims that she would have been capable of performing her job if she had been accommodated, she has the initial burden of having proposed an accommodation and showing that the accommodation is objectively reasonable. *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1183 (6th Cir. 1996); see also, *Schmidt v. Safeway, Inc.*, 864 F. Supp. 991,997 (D. Or. 1994) (noting that an employee cannot "expect the employer to read his mind and know he secretly wanted a particular accommodation"). Where a plaintiff seeks accommodation, "she must establish that a 'reasonable accommodation is possible, and bears a traditional burden of proof that she is qualified for the position with such reasonable accommodation." *Monette*, 90 F.3d at 1186 n.12.

The record here shows that Whirlpool granted the only accommodation requested by plaintiff--providing her with a conveyor to assist her work. Pl.'s Depo. at 49. Nevertheless,

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[7] Defendant's duty to reasonably accommodate plaintiff is typically not argued as an "adverse employment action." Disability discrimination can include both an employer's taking an adverse employment action based on an employee's disability or an employer's failure to make a reasonable accommodation. *See e.g., Roush v. Weastec Inc.*, 96 F.3d 840, 843 (6th Cir. 1996) ("To prevail on her ADA claim, therefore, *Roush* must prove that (1) she has a disability; (2) she was qualified for the job; and (3) she either was denied a reasonable accommodation for her disability or was subject to an adverse employment decision that was made solely because of her disability.").

plaintiff seems to argue that there were other jobs she was capable of performing at Whirlpool.

Transfer or reassignment of an employee is within the realm of possible reasonable accommodation. In *Burns v. Coco-Cola Enters., Inc.*, 222 F.3d 247, 258-59 (6th Cir. 2000), the Sixth Circuit held that a plaintiff must establish that she requested and was denied reassignment to a position for which she was otherwise qualified. Alternatively, a plaintiff may show that she requested and was denied assistance in identifying jobs for which she was otherwise qualified.

In this case, plaintiff failed to offer proof that she requested a reassignment or that there were currently available positions for which she was qualified.

As to plaintiff's argument about defendant's "unwritten" policy, plaintiff has presented no evidence, beyond her bare allegations and subjective belief, that such a policy existed. Such serf-serving assertions are not sufficient to create a question of fact. Thus, plaintiff has not met her burden in establishing a failure to accommodate.[8]

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[8] It should be noted that in *Shaver v. Wolske & Blue*, 138 Ohio App. 3d 653, 668 (Ohio App. 2000), the court stated: "Federal courts, relying on the Equal Employment Opportunity Commission ("EEOC") compliance manual, have recognized that third-parties, such as family members, friends or health professionals, may request an accommodation on the employee's behalf." (citations omitted). Here, there is evidence that a Whirlpool doctor -- even though plaintiff does not recall seeing this doctor or having these restrictions placed on her -- concluded that after plaintiff's March, 1996, tow motor accident, she should only work under certain restrictions. As noted above, these restrictions were to end on May 10, 1996. Plaintiff returned to work on April 15, 1996, under her

C. Essential Functions of the Job

The third element of a handicap discrimination case in Ohio is "that the person, though handicapped, can safely and substantially perform the essential functions of the job in question." *City of Columbus Civ. Serv. Comm'n*, 82 Ohio St. 3d at 571. This has been interpreted as requiting the plaintiff to show she can "safely and substantially perform the essential functions of the job *with or without a reasonable accommodation.*" *Shaver v. Wolske & Blue*, 138 Ohio App. 3d 653,663 (Ohio App. 2000) (emphasis added).

Plaintiff testified that she is not able to perform the essential functions of her job. In her deposition, she stated:

Q: You contend that you are unable to work in any form at this time?
A: If I don't have any sleep and I can't control my bladder or my bowel am I supposed to wear pull-ups to work and not go with any sleep? I don't think so.

Q: For clarity of record you are unable to work.
A: Right.

Q: There are no jobs which you feel you can perform. You have to answer verbally.
A: No.

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own doctor's orders of no restrictions. Thus, plaintiff never worked under restrictions. Nonetheless, because plaintiff never requested accommodation thereafter, defendant cannot be found to have failed to accommodate her.

Pl.'s Depo. at 111.

Plaintiff further testified that in 1998, 1999, and 2000, when plaintiff took family medical leave, voluntary layoff, and extended medical leaves, she was taking time off because she "hurt so bad [she] couldn't work." Id. at 59. The record also shows that plaintiff claimed she was "disabled and unable to work" in September, 1999. In February, 2000, plaintiff applied for and received disability retirement. She also applied for workers compensation benefits, although her claim was eventually denied.

This evidence demonstrates that plaintiff has not met her burden in proving she could "safely and substantially perform the essential functions of the job in question." Even if she could have performed a job with reasonable accommodation, as explained above, she did not request an accommodation and it was her duty to do so. Plaintiff therefore has not met her burden of proposing an accommodation, especially when it must be assumed that she would need an accommodation to perform the essential functions of any job.

Because plaintiff has failed to make a prima facie case, defendant's motion for summary judgment on plaintiff's disability discrimination claim is granted.

II. Harassment

The Sixth Circuit has recognized hostile work environment claims based on alleged workplace harassment because of disability. *See Keever v. Middletown*, 145 F.3d 809 (6th Cir. 1998). The standard for an ADA hostile work environment claim tracks that used for hostile work environment sexual harassment claims. *Coulson v. Goodyear Tire & Rubber Co.*, 2002 U.S. App. LEXIS 4623, at * 18-19

(6th Cir. Mar. 14 2002) (citing *McClain v. Southwest Steel Co.*, 940 F. Supp. 295 (N.D. Okla. 1996). Harassment occurs "when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Williams v. General Motors Corp.*, 187 F.3d 553, 560 (6th Cir. 1999) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

In this case, plaintiff admits that no one at Whirlpool made negative comments to her with respect to her disability. Pl.'s Depo. at 144. Instead, plaintiff argues that Whirlpool "harassed her by contesting her workers compensation filings despite its knowledge of the true extent of her problems." Pl.'s Complt. at ¶ 8. Plaintiff further alleges that defendant "stepped up its campaign of harassment" when it "refused to accommodate her in any way, and would only let her return to work to full duty." *Id.*

As defendant argues, because Whirlpool is a self-insured employer, it must have the right to approve or deny its employees' workers compensation claims based on the medical information before it. More importantly, however, plaintiff has not provided any evidence that Whirlpool's response to plaintiff's workers compensation claim was different than its response to any other employee's claims or that Whirlpool responded in a harassing or discriminatory manner. Similarly, as explained in the discrimination section of this opinion, plaintiff's claim that defendant harassed her because it failed to accommodate her is not demonstrated by the record. Plaintiff admitted that the only accommodation she requested was granted.

Defendant's motion for summary judgment for plaintiff's harassment claim is therefore granted.

III. Retaliation

Ohio Revised Code § 4112.02(1) states that it shall be an unlawful discriminatory practice:

> For any person to discriminate in any manner against any other person because that person has opposed any unlawful discriminatory practice defined in this section or because that person has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under sections 4112.01 to 4112.07 of the Revised Code.

To establish a prima facie case of unlawful retaliation, a plaintiff must establish "(1) that he engaged in a protected activity; (2) that he was the subject of an adverse employment action; and (3) that a causal link existed between the protected activity and the adverse action." *Thatcher v. Goodwill Inds. of Akron*, 117 Ohio App. 3d 525, 534-35 (1997) (citing *Chandler v. Empire Chem., Inc. Midwest Rubber Custom Mixing Div.*, 99 Ohio App. 3d 396, 402 (1994)). Absent other direct or compelling circumstantial evidence, temporal proximity alone is insufficient to support a finding of a causal connection. *Pflanz v. City of Cincinnati*, 149 Ohio App. 3d 743, 763 (2002)(citations omitted).

The protected activity plaintiff claims she engaged in is "raising disability issues and requesting treatment and accommodation as to the injuries suffered in March, 1996." Pl.'s Br. at 14. As a result of reporting her disability, plaintiff claims defendant "engaged in a campaign of harassment" by failing to properly treat and accommodate her disability and

never including her "injured back, neck and hips in her Worker's Compensation claim." Pl.'s Complt. at ¶ 13; Pl.'s Br. at 15.

Plaintiff has not explained how "raising disability issues" and "requesting treatment and accommodation" are statutorily protected activities. Regardless, plaintiff has presented no evidence that failing to include plaintiff's alleged neck and back injuries on her workers compensation claim could be classified as an adverse employment action or that defendant engaged in any kind of harassment campaign. In fact, the record demonstrates that Whirlpool granted every medical leave and accommodation plaintiff asked for, and when plaintiff could not work anymore, she *voluntarily* filed for disability retirement. Additionally, as explained above, plaintiff cannot argue the adverse employment action was Whirlpool's failure to accommodate her disability.

Finally, plaintiff has failed to offer any evidence of a causal relationship between her report of a disability and an adverse employment action. Thus, defendant's motion for summary judgment is granted as to this claim.

CONCLUSION

It is, therefore,

Ordered that

Defendant's motion for summary judgment be, and hereby is, granted.

So ordered.

/s/ _____
James G. Carr
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 3:02CV7141

ORDER

Patricia Clark,
Plaintiff

v.

Whirlpool Corporation,
Defendant

For the reasons stated in the Order filed March 18, 2003, it is hereby **Ordered** that defendant's motion for summary judgment be, and hereby is, granted.

Case closed.

So ordered.

/s/
James G. Carr
United States District Judge

APPENDIX D

Selected Sections of the Ohio Revised Code

§ 4112.01 Definitions

(A) As used in this chapter:

(1) "Person" includes one or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. "Person" also includes, but is not limited to, any owner, lessor, assignor, builder, manager, broker, salesperson, appraiser, agent, employee, lending institution, and the state and all political subdivisions, authorities, agencies, boards, and commissions of the state.

(2) "Employer" includes the state, any political subdivision of the state, any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer.

(3) "Employee" means an individual employed by any employer but does not include any individual employed in the domestic service of any person.

(4) "Labor organization" includes any organization that exists, in whole or in part, for the purpose of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or other mutual aid or protection in relation to employment.

(5) "Employment agency" includes any person regularly undertaking, with or without compensation, to procure opportunities to work or to procure, recruit, refer, or place employees.

(6) "Commission" means the Ohio civil rights commission created by section 4112.03 of the Revised Code.

(7) "Discriminate" includes segregate or separate.

(8) "Unlawful discriminatory practice" means any act prohibited by section 4112.02, 4112.021 [4112.02.1], or 4112.022 [4112.02.2] of the Revised Code.

(9) "Place of public accommodation" means any inn, restaurant, eating house, barbershop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

(10) "Housing accommodations" includes any building or structure, or portion of a building or structure, that is used or occupied or is intended, arranged, or designed to be used or occupied as the home residence, dwelling, dwelling unit, or sleeping place of one or more individuals, groups, or families whether or not living independently of each other; and any vacant land offered for sale or lease. "Housing accommodations" also includes any housing accommodations held or offered for sale or rent by a real estate broker, salesperson, or agent, by any other person pursuant to authorization of the owner, by the owner, or by the owner's legal representative.

(11) "Restrictive covenant" means any specification limiting the transfer, rental, lease, or other use of any housing accommodations because of race, color, religion, sex, familial status, national origin, disability, or ancestry, or any limitation based upon affiliation with or approval by any person, directly or indirectly, employing race, color, religion, sex, familial status, national origin, disability, or ancestry as a condition of affiliation or approval.

(12) "Burial lot" means any lot for the burial of deceased persons within any public burial ground or cemetery, including, but not limited to, cemeteries owned and operated by municipal corporations, townships, or companies or associations incorporated for cemetery purposes.

(13) "Disability" means a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.

(14) Except as otherwise provided in section 4112.021 [4112.02.1] of the Revised Code, "age" means at least forty years old.

(15) "Familial status" means either of the following:

(a) One or more individuals who are under eighteen years of age and who are domiciled with a parent or guardian having legal custody of the individual or domiciled, with the written permission of the parent or guardian having legal custody, with a designee of the parent or guardian;

(b) Any person who is pregnant or in the process of securing legal custody of any individual who is under eighteen years of age.

§ 4112.02 Unlawful discriminatory practices

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

(B) For an employment agency or personnel placement service, because of race, color, religion, sex, national origin, disability, age, or ancestry, to do any of the following:

(1) Refuse or fail to accept, register, classify properly, or refer for employment, or otherwise discriminate against any person;

(2) Comply with a request from an employer for referral of applicants for employment if the request directly or indirectly indicates that the employer fails to comply with the provisions of sections 4112.01 to 4112.07 of the Revised Code.

(C) For any labor organization to do any of the following:
(1) Limit or classify its membership on the basis of race, color, religion, sex, national origin, disability, age, or ancestry;

(2) Discriminate against, limit the employment opportunities of, or otherwise adversely affect the employment status,

wages, hours, or employment conditions of any person as an employee because of race, color, religion, sex, national origin, disability, age, or ancestry.

(D) For any employer, labor organization, or joint labor-management committee controlling apprentice training programs to discriminate against any person because of race, color, religion, sex, national origin, disability, or ancestry in admission to, or employment in, any program established to provide apprentice training.

(E) Except where based on a bona fide occupational qualification certified in advance by the commission, for any employer, employment agency, personnel placement service, or labor organization, prior to employment or admission to membership, to do any of the following:

(1) Elicit or attempt to elicit any information concerning the race, color, religion, sex, national origin, disability, age, or ancestry of an applicant for employment or membership;

(2) Make or keep a record of the race, color, religion, sex, national origin, disability, age, or ancestry of any applicant for employment or membership;

(3) Use any form of application for employment, or personnel or membership blank, seeking to elicit information regarding race, color, religion, sex, national origin, disability, age, or ancestry; but an employer holding a contract containing a nondiscrimination clause with the government of the United States, or any department or agency of that government, may require an employee or applicant for employment to furnish documentary proof of United States citizenship and may retain that proof in the employer's personnel records and may use

photographic or fingerprint identification for security purposes;

(4) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification, or discrimination, based upon race, color, religion, sex, national origin, disability, age, or ancestry;

(5) Announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, sex, national origin, disability, age, or ancestry of that group;

(6) Utilize in the recruitment or hiring of persons any employment agency, personnel placement service, training school or center, labor organization, or any other employee-referring source known to discriminate against persons because of their race, color, religion, sex, national origin, disability, age, or ancestry.

(F) For any person seeking employment to publish or cause to be published any advertisement that specifies or in any manner indicates that person's race, color, religion, sex, national origin, disability, age, or ancestry, or expresses a limitation or preference as to the race, color, religion, sex, national origin, disability, age, or ancestry of any prospective employer.

(G) For any proprietor or any employee, keeper, or manager of a place of public accommodation to deny to any person, except for reasons applicable alike to all persons regardless of race, color, religion, sex, national origin, disability, age, or ancestry, the full enjoyment of the accommodations,

advantages, facilities, or privileges of the place of public accommodation.

(H) For any person to do any of the following:

(1) Refuse to sell, transfer, assign, rent, lease, sublease, or finance housing accommodations, refuse to negotiate for the sale or rental of housing accommodations, or otherwise deny or make unavailable housing accommodations because of race, color, religion, sex, familial status, ancestry, disability, or national origin.

* * * *

§ 4112.99 Civil remedies for violation

Whoever violates this chapter is subject to a civil action for damages, injunctive relief, or any other appropriate relief.

HISTORY: 128 v 12 (Eff 7-29-59); 133 v H 432 (Eff 11-12-69); 136 v S 162 (Eff 7-23-76); 142 v H 5 (Eff 9-28-87); 146 v H 350 (Eff 1-27-97); 149 v S 108, § 2.01. Eff 7-6-2001.

SELECTED 2003 OHIO REVISED CODE SUPPLEMENT EXCERPTS

§4112.01 Definitions.

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Handicap
Out-of-state corporation
Substantial limitation

Disability discrimination

Lifting and living with pain are not major life activities under RC § 4112.01. Inability to perform a particular job is not a substantial limitation on the major life activity of working. The employee did not show that the position offered as an accommodation was not reasonable or that other comparable jobs existed that he could perform: *Pflanz v. Cincinnati*, 149 Ohio App. 3d 743, 2002-Ohio-5492, 778 N.E.2d 1073 (2002).

Handicap

There was substantial, competent evidence to support the plaintiff's claim that she was not allowed to return to work due, at least in part, to the fact that she was handicapped where her employer's personnel manager testified that she was not allowed to return to work because of "financial concerns," which were related to the possibility that appellant might re-injure herself: *Wadding v. Sandusky Vinyl Products*, 1998 Ohio App. LEXIS 5053 (6th Dist. 1998).

Out-of-state corporation

An out-of-state corporation which has four employees working within Ohio at the time of the alleged discrimination is an "employer" under RC Chapter 4112. A temporary employee who was knowingly an independent contractor qualified as an "'employee": *Sublett v. Edgewood Universal Cabling System*, 194 F. Supp. 2d 692 (S.D. 2002).

Substantial limitation

Inability to perform a single, particular job does not constitute substantial limitation in the major life activity of working: *Wiegerig v. Timken Co.*, 144 Ohio App. 3d 664, 761 N.E.2d 118 (2001).

Inability to perform a single, particular job does not constitute a substantial limitation on the major life activity of working. The major life activity of breathing was not substantially limited where the employee could simply avoid environments with odd air drafts: *DeBolt v. Eastman Kodak Co.*, 146 Ohio App. 3d 474, 2001-Ohio-3996, 766 N.E.2d 1040 (2001).

§ 4112.02 Unlawful discriminatory practices.

ALR

Discrimination against pregnant employee as violation of state fair employment laws, 99 ALR5th 1.

When is work environment intimidating, hostile, or offensive, so as to constitute sexual harassment under state law. 93 ALR5th 47.

Law Review

Flowers v. Southern Regional Physician Services: a step in the right direction, Note. 33 UToledoLRev 713 (2002).

Sexual harassment claims in the new millennium: a litigator's point of view. G. Roger King, 27 Ohio N.U.L. Rev. 539 (2001).

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Generally

Non-supervisory employees are not subject to liability under RC Chapter 4112. They are subject to liability under § 1981. Appellant's inability to work cooperatively within a group medical practice constituted a legitimate nondiscriminatory reason for not renewing her contracts. Any rudeness by the staff or other annoyances did not rise to the level of adverse employment actions: *Samadder v. DMF of Ohio, Inc.*, 154 Ohio App. 3d 770 (2003).

The employer did not present evidence that tied the employee's confrontational style to the decision to terminate her. The employer did not establish a legitimate, nondiscriminatory reason for termination that would entitle it to summary judgment: *Blanton v. Cuyahoga Cty. Bd. of Elections*, 150 Ohio App. 3d 61, 2002-Ohio-6044, 779 N.E.2d 788 (2002).

In determining whether a defendant's conduct is sufficiently extreme and outrageous, a factfinder may consider the context or environment in which the acts occur. The factfinder may also consider the plaintiff's role in creating or participating in that environment: *Strausbaugh v. Ohio Dept. of Transp.*, 150 Ohio App. 3d 438, 2002-Ohio-6627, 782 N.E.2d 92 (2002).

Adverse employment action

An employee did not show that she suffered an adverse employment action where her sales territory reassignment meant she had to spend more time in an adjacent state, but did not involve any other negative aspects: *Policastro v. Norwest Airlines, Inc.*, 297 F.3d 535 (6th Cir. 2002).

Age discrimination

An employer's multiple reference to negative, age-related stereotypes may be evidence of discriminatory intent. Although an absence of discrimination may be inferred where the same individual hired and fired an employee, such inference is not required: *Wexler v. White's Fine Furniture Inc.*, 317 F.3d 564 (6th Cir. 2003).

The evidence established that plaintiff left employment due to personality conflicts with managers and due to job reorganizations, not age discrimination: *Manis v. Hoxworth Blood Ctr., Univ. of Cincinnati Med. Ctr.*, 120 Ohio Misc. 2d 43, 2002-Ohio-5496, 777 N.E.2d 918 (CtC 2002).

The evidence established that plaintiff left employment due to personality conflicts with managers and due to job reorganizations, not age discrimination: *Manis v. Hoxworth Blood Ctr., Univ. of Cincinnati Med. Ctr.*, 120 Ohio Misc. 2d 43, 2002-Ohio-5496, 777 N.E.2d 918 (CtC 2002).

Plaintiff did not establish age discrimination where he was discharged based on a plausible claim of sexual misconduct. Age-related comments were not severe or pervasive enough to create an objectively hostile environment: *Surry v. Cuyahoga Community College*, 149 Ohio App. 3d 528, 2002-Ohio-5356, 778 N.E.2d 91 (2002).

For purposes of age discrimination claims, the fact that younger employees assumed the plaintiff's duties is not sufficient to constitute replacement. Plaintiff did not show that his termination permitted promotion or retention of a younger employee: *Gunthorpe v, DaimlerChrysler Corp.*, 205 F. Supp. 2d 820 (N.D. Ohio 2002).

The plaintiff established a prima facie case of age discrimination. He did not rebut the employer's proffered business reasons by its action. What may have satisfied one management regime does not necessarily satisfy its successor. *Peters v. Lincoln Elec. Co.*, 285 F.3d 456 (6th Cir. 2002).

The ADEA may provide a cause of action for age discrimination to employees within the protected class who claim their employer discriminated by providing more favorable treatment to older employees: *Cline v. General Dynamics Land Systems, Inc.*, 296 F.3d 466 (6th Cir. 2002).

There was sufficient evidence to support the finding that enforcement of the attendance policy was a pretext for age discrimination, but not to support an award of punitive damages: *Pelletier v. Rumpke Container Serv.*, 142 Ohio App. 3d 54, 753 N.E.2d 958 (2001).

Disability discrimination

An employer's duty to participate in an interactive process is triggered by a request for a reasonable accommodation by an employee with a disability: *DeCesare v. Niles City School Dist. Bd. Of Edn.*, 154 Ohio App. 3d 644 (2003).

Depression may qualify as a handicap under RC § 4112.02. The reasonableness of an accommodation ordinarily presents a jury question: Mitnaul v, Furmont Presbytarian Church, 149 Ohio App. 3d 769, 2002-Ohio-5833, 778 N.E.2d 1093 (2002).

An employer's subjective perception that a 17-year disability absence provides grounds for treating an employee differently than an absence of fewer years is exactly the sort of stereotypical thinking which the ADA seeks to prohibit:

Pollitt v. Roadway Express, Inc., 228 F. Supp.2d 854 (S.D. 2002).

Election of remedies

Evidence

Discharged employee did not establish racial or religious discrimination where no other employee engaged in comparable misuse of the employer's computer and telephone systems: *Obu v. Ohio Dept. of Aging*, 119 Ohio Misc.2d 131, 2002-Ohio-4141, 774 N.E. 2d 812 (CtC 2002).

The employer provided credible reasons that the discharge was due to job performance, rather than a perceived mental impairment: *Detzel v. Brush Wellman, Inc.*, 141 Ohio App. 3d 474, 751 N.E.2d 1067 (2001).

--Replacement

Plaintiff did not establish a prima facie case of age discrimination where her alleged replacement was 42, also within the protected class: *Keener v. Legacy Health Serv.*, 148 Ohio App. 3d 321, 2001-Ohio-4384, 773 N.E.2d 555 (2001).

Fair housing

--Denial of variance

The city did not violate fair housing laws by refusing to grant the multiple, substantial variances needed to permit transitional housing for homeless mentally ill persons on property zoned for semi-industrial use: *Eppler v. Cleveland*, 142 Ohio App. 3d 91, 753 N.E.2d 986 (2001).

Gender discrimination

The election of remedies requirement does not apply to claims of sex discrimination: *Noday v. Mahoning Cty. Sheriff*, 147 Ohio App. 3d 38, 2002-Ohio-609, 768 N.E.2d.726 (2002).

The employer was not entitled to a directed verdict in a gender discrimination case where the employee presented sufficient evidence that comparable male employees were "similarly situated" in all relevant respects: *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St. 3d 30, 748 N.E.2d 36 (2001).

Because a prohibition against breast-feeding in a public accommodation is inapplicable to men and to adults, it cannot be demonstrated that it discriminates against women and infants based on their status as women and infants. Therefore, it does not violate RC § 4112.02(G): *Derungs v. Wal-Mart Stores, Inc.*, 141 F. Supp.2d 884 (S.D. 2000).

Handicap discrimination

An employer is not obligated to provide an accommodation that would eliminate an essential function of a job: *DeBolt v. Eastman Kodak Co.*, 146 Ohio App. 3d 474, 2001-Ohio-3996, 766 N.E.2d 1040 (2001).

Where co-worker and managerial ostracism of plaintiff did not rise to a material change in the terms and conditions of employment and thus did not constitute an adverse employment action, the issue as to whether plaintiff was ostracized because of plaintiff's handicap was moot: *Wilhelm v. CSX Transp., Inc.*, 169 F. Supp.2d 755 (N.D. Ohio 2001).

Individual liability

Supervisors and managers *may* be held individually liable

for unlawful discriminatory acts: *Wallace v. Henderson*, 138 F. Supp.2d 980 (S.D. 2000).

Public accommodations

The civil rights commission was not liable for pursuing a charge of housing discrimination based on familial status where the lease provided a reasonable basis for the charge: *Tomsu v. Ohio Civ. Rights Comm.*, 116 Ohio Misc.2d 24, 764 N.E.2d 516 (CtC 2001).

Race discrimination

The employee did not establish a prima facie case of reverse race discrimination or of retaliation: *Ekstrom v. Cuyahoga Cty. Community College*, 150 Ohio App. 3d 169, 2002-Ohio-6228, 779 N.E.2d 1067 (2002).

Employer was entitled to summary judgment on claim that it created a racially hostile work environment and of disparate impact, but not on certain claims of failure to promote: *Ulmer v. Dana Corp.*, 200 F. Supp.2d 804 (N.D. Ohio 2002).

African American employees who were discharged for refusing overtime work did not present a prima facie case of discrimination where they did not produce evidence that they were replaced by workers who were not African-American: *Vaughn v. Watkins Motor Lines, Inc.*, 291 F.3d 900 (6th Cir. 2002).

Reduction in force

An employee did not show age or gender discrimination where his position was eliminated as part of a reduction in force: *Whitt v. Lockheed Martin Utility Services, Inc.*, 209 F. Supp. 2d 787 (S.D. 2002).

Religious discrimination

It was not reasonable to require a bank to waive its security procedures concerning check cashing in order to accommodate the alleged religious beliefs of an individual: *Yeager v. Ohio Civ. Rights Comm.*, 148 Ohio App. 3d 459, 2002-Ohio 3383, 773 N.E.2d 1097 (2002).

Retaliation

A retaliation claim was not established where, in response a threat of violence by the employee against his former department, the city issued a hazard poster: *Pflanz v. Cincinnati*, 149 Ohio App. 3d 743, 2002-Ohio-5492, 778 N.E.2d (2002).

The employee did not show that there was retaliation for exercising her rights or that she was constructively discharged. The employee was not terminated by the employer's action where she declined to accept an extension of her probationary contract: *Mittman v. Bahls*, 148 Ohio App. 3d 109, 2002-Ohio-2808, 772. N.E.2d 181 (2002).

The five month delay between filing of the discrimination claim and the disciplinary action rendered the connection too tenuous for purposes of a retaliation claim: *McDonald v. Ford Motor Co.*, 208 F. Supp. 2d 837 (N.D. Ohio 2002).

The employer was entitled to summary judgment on the retaliatory discharge claim, but not on the sexual harassment claim: *Brentlinger v. Highlights for Children*, 142 Ohio App. 3d 25, 753 N.E.2d 937 (2001).

Plaintiff was not collaterally estopped from bringing an action for retaliatory discharge where he did not have a full and fair opportunity to litigate the issue at the civil rights commission hearing: *Doan v. S. Ohio Adm. Dist. Council,*

Internatl. Union of Bricklayers & Allied Craftworkers, 145 Ohio App. 3d 482, 763 N.E.2d 639 (2001).

Reverse race discrimination

A White male failed to show that his employer was the unusual employer who discriminated against white males: *Bellinger v. Weight Watchers Gourmet Food Co.*, 142 Ohio App. 3d 708, 756 N.E.2d 1251 (2001).

The employee was not required to exhaust her administrative remedies prior to filing an action under RC § 4112.99 alleging reverse race and retaliatory discrimination. The employee failed to demonstrate a prima facie case on either claim: *Carney v. Cleveland Hts.-Univ. Hts. City School Dist.*, 143 Ohio App. 3d 415, 758 N.E.2d 234 (2001).

Sexual harassment

Not all conduct in the employment context that can be construed as having sexual connotations can be classified as harassment in violation of RC § 4112.02. Conduct that is offensive but is not severe or pervasive under the subjective and objective standard is not actionable: *Vitatoe v. Lawrence Industries, Inc.*, 153 Ohio App.3d 609 (2003).

For a single incident to constitute actionable sexual harassment, the conduct must be particularly egregious: *Gliatta v. Tectum, Inc.*, 211 F. Supp.2d 992 (S.D. 2002).

The employer was not entitled to summary judgment on a claim of hostile work environment sexual harassment: *Hoschak v. Defiance County Engineers*, 218 F. Supp. 2d 917 (N.D. Ohio 2002).

The defendants' conduct was not based on sex, but was a juvenile expression of provocation: *Toth v. Ohio Dept. of*

Youth Serv., 113 Ohio Misc.2d 1, 754 N.E.2d 305 (CtC 2001).

The employer was not entitled to summary judgment on all the claims of sex discrimination and sexual harassment: *Starner v. Guardian Industries*, 143 Ohio App. 3d 461, 758 N.E.2d 270 (2001).

The employer was nor entitled to summary judgment on claims of hostile environment sexual harassment, constructive discharge, and retaliation: *Hogan v. Field Container Corp.*, 145 Ohio App. 3d 446, 763 N.E.2d 612 (2001).

Similarly situated

A black female employee did not show that similarly situated non-protected employees received preferential treatment. Employees are not similarly situated if they have different amounts of seniority: *Homes-Naples v. Girard Bd. of Educ.*, 212 F. Supp.2d 743 (N.D. Ohio 2002.).

Statute or limitations

The limitations period applicable to RC § 4112.14 age-discrimination claims is six years. Ohio law recognizes a claim for tortious wrongful termination in violation of public policy based on age discrimination: *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App. 3d 301, 2002-Ohio-4398, 777 N.E.2d 282 (2002).

§ 4112.99 Civil remedies for violation

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Disparate treatment

The employer was not entitled to a directed verdict in a gender discrimination case where the employee presented sufficient evidence that comparable male employees were "similarly situated" in all relevant respects: *Kroh v. Continental Gen. Tire, Inc.*, 92 Ohio St. 3d 30, 748 N.E.2d 36 (2001).

Election of remedies

The election of remedies requirement does not apply to claims of sexual discrimination: *Noday v. Mahoning Cty. Sheriff*, 147 Ohio App. 3d 38, 2002-Ohio-609, 768 N.E.2d 726 (2002).

The act of filing an age discrimination charge with the state civil rights commission bars a civil suit in a court: *Vinson v. Diamond Triumph Auto Glass, Inc.*, 149 Ohio App. 3d 605, 2002-Ohio-5596, 778 N.E.2d 149 (2002).

The act of filing an unlawful discriminatory practice charge with the Ohio Civil Rights Commission under RC § 4122.05 (B)(1) does not preclude a person alleging handicap discrimination from instituting an independent civil action

under RC § 4112.99: *Smith v. Friendship Village of Dublin, Ohio, Inc.*, 92 Ohio St. 3d 503, 751 N.E.2d 1010 (2001).

Fraud

There was sufficient evidence of fraud for purposes of RC § 4123.51.1(J): *State ex rel. Ellis v. Indus. Comm.*, 92 Ohio St. 3d 508, 751 N.E.2d 1015 (2001).

Retaliation

Plaintiff was not collaterally estopped from bringing an action for retaliatory discharge where he did not have a full and fair opportunity to litigate the issue at the civil rights commission hearing: *Doan v. S. Ohio Adm. Dist. Council, Internatl. Union of Bricklayers & Allied Craftworkers*, 145 Ohio App. 3d 482, 763 N.E. 639 (2001).

Reverse discrimination

The fact that the person in charge of hiring was an African-American was sufficient to satisfy the "background circumstances" requirement, creating an issue of material fact on a claim of reverse discrimination: *Zambatti v. Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002).

Statute of Limitations

The limitations period applicable to RC § 4112.14 age-discrimination claims is six years. Ohio law recognizes a claim for tortious wrongful termination in violation of public policy based on age discrimination: *Ferraro v. B.F. Goodrich Co.*, 149 Ohio App. 3d 301, 2002-Ohio-4398, 777 N.E.2d 282 (2002).